Pages 1 - 53

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Nathanael M. Cousins, Magistrate Judge

Chevron Corporation, Plaintiff, vs. Steven Donziger, et al, Defendant.	No. MC12-80237 CRB (NC)

San Francisco, California
Wednesday, January 16, 2013

TRANSCRIPT OF PROCEEDINGS OF THE OFFICIAL ELECTRONIC SOUND RECORDING

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Wednesday, January 16, 2013 1:36 p.m.

THE CLERK: Calling Miscellaneous 12-80237, Chevron Corporation versus Steven Donziger, et al.

THE COURT: Good afternoon. Come on forward. Don't be shy.

MR. BOUTROUS: Good afternoon, Your Honor. Ted Boutrous for Chevron.

THE COURT: Good afternoon, Mr. Boutrous.

MS. HOFFMAN: Good afternoon, Your Honor. Marcia Hoffman for the Non-Party Movants.

THE COURT: Good afternoon.

MR. HICKS: Good afternoon, Your Honor. Bill Hicks from the law firm of Keker & Van Nest.

We represent the Donziger Defendants in the underlying RICO action. Here today I'm here to speak on behalf of all of the Moving Defendants.

THE COURT: Thank you, Mr. Hicks. Good afternoon.

MR. HICKS: Good afternoon.

THE COURT: All right.

MS. HOFFMAN: Your Honor, if it's --

THE COURT: Yeah.

MS. HOFFMAN: -- all right with you, I was hoping that perhaps we might deal with a motion to quash on behalf of the Non-Party Movants first because I think we can dispose

of some issues hopefully very quickly and easily that are not common to everybody here.

THE COURT: I appreciate that. I am actually going to start with Mr. Boutrous for Chevron just on -- and I want to get your views on it too. They filed the notice of -- the action in New York encouraging me to wait until Judge Kaplan and the court there in New York have ruled.

And one, I wanted to see if there's an update on that request, and to see if there's any views from the other parties on that particular procedural component.

MR. BOUTROUS: Yes, Your Honor. Thank you.

The briefs, I think, just our -- our response briefs were filed last night to that because I don't think we have a hearing date yet, and really, however the Court wants to proceed, we're fully briefed here.

Some of the issues that the Does and the -- the Defendants raise regarding what Judge Kaplan is thinking or doing, I think, are better decided by him, but we're prepared to argue today on any issue the Court wants to hear and -- and ready to go.

THE COURT: Great. I appreciate that. Let me hear from the other -- other parties as well about the -- the timing question of here versus New York.

MS. HOFFMAN: Your Honor, I think you should go ahead and decide this motion now for two reasons.

The first is that there's binding Ninth Circuit precedent that disposes of this issue, which is *Perry versus Schwarzenegger*, and that is not binding precedent in the action in New York, and so I think that there could be potentially some possibility for inconsistent results, even if you wait.

So I think what Judge Kaplan does is not something that it -- you're -- you're in two different situations in terms of applying legal precedent.

The second reason is because we are bringing an independent California State Constitutional claim that we're not bringing in New York, and so no matter what you're going to be deciding that exclusively, and Judge Kaplan is not -- not looking at that question.

So I think it makes the most sense for you to just go ahead and decide this motion.

THE COURT: Now, even assuming everything you've said is true, one approach might be to wait to see what Judge Kaplan does on the -- on the issues or -- and I may ultimately disagree with him that he -- or ignore everything he says, but wait to see what he says on the issues that are in common and then know that there's California law that might be applied, or Ninth Circuit law that would be special here and that I might be better served to wait and see what's in common and then do an overlay, but I -- I hear what you're

saying.

Mr. Hicks, any -- any thoughts on the procedural order of things?

MR. HICKS: No. I -- I -- I agree that -- that -- that Your Honor should decide the motion now, and we're -- we're prepared to argue. I think it makes at least -- at least -- at least makes sense to, you know, hear the motion now and --

THE COURT: Yeah. I am going to hear everybody's arguments and -- but I am inclined to -- probably to take them under submission and to think about them a little bit, but we'll see how the argument goes, and I appreciate everyone's preparation and all the substantial briefs that have been filed.

So with that, let me turn back to Ms. Hoffman, I think, and have her argue first as the Moving Party.

And Mr. Boutrous, we'll, of course, give you a chance to respond following her.

MR. BOUTROUS: Great. Thank you, Your Honor.

THE COURT: You may sit down.

MS. HOFFMAN: Your Honor, this case can be decided by relying on the straightforward application of just two cases.

The first is *Perry versus Schwarzenegger*, which is a case decided by the Ninth Circuit. It's binding precedent.

And that case stands for the -- the proposition that individuals seeking discovery, parties seeking discovery face a high bar when they're seeking information that impinges upon the First Amendment right to association.

Here, Chevron is seeking nine years of identity and email usage information about 101 email accounts. And this information includes details about the identities and the activities of dozens of activists and lawyers and scholars and journalists, among others.

And the common thread that these people -- that runs through all of these people's activities is that they are engaged in environmental activism, which is political speech that is highly protected by the First Amendment. And they have a First Amendment right to associate with each other in order to advance their political ideas and beliefs.

And these subpoenas threaten to deter those activities, and they, as -- as the declarations that we've put forward in support of our motion show, these people feel harassed by this, and there is a possibility that their future political activities are -- are going to be chilled by this.

And so under *Perry*, what we look to is a two -- a two-prong framework. The first question is whether the disclosure of the information that Chevron seeks is likely to result in harassment, membership withdrawal or chilling of

the political expression of -- of the individuals that I represent.

And those individuals have submitted seven declarations indicating that all of these factors are present. They -- they feel harassed.

At least one Doe said that she decided not to accept work because she didn't want to make herself a further target of Chevron. One Doe indicated a fear for personal safety, and many of these Does said that moving forward that they don't expect that they would continue to -- to engage in active -- in environmental activist activities if they, you know, feel that Chevron is going to be mapping their associations and -- and perhaps tracking their movements over time.

So our clients have met their burden. Now, that means that the burden shifts to Chevron to show that the information that they seek is rationally related to a compelling state interest and the discovery requests are the least restrictive means of obtaining that information.

Now, Chevron does not have a compelling interest and -- and -- and the state does not have a compelling interest in forcing these people to be subject to this kind of invasion.

Chevron has done extensive discovery in this case. It has obtained a tremendous amount of information, and it

can -- it can make its claims without having to obtain this information as well, and it hasn't shown otherwise.

Chevron has pointed out that it has faced some discovery battles in this litigation and -- and surely that's true, but it's also obtained a tremendous amount of -- of discovery, which I think Mr. Hicks can discuss more -- more directly as somebody who represents a party to this case.

There's no indication that it needs -- that -- that Chevron needs this information to make its case, and this certainly these -- these subpoenas are not the least restrictive means of obtaining information it hope -- it hopes for anyway.

On their face, we're talking about subpoenas that seek nine years of details about these people's lives. As a practical matter, we understand from Google and Yahoo! that in the ordinary course of their business they only retain about a -- about a year of data anyway. And so basically what we're --

THE COURT: And that cuts against you. In some ways if --

MS. HOFFMAN: Well --

THE COURT: If only a year would be produced, then maybe the harm is not so great?

MS. HOFFMAN: Well, let me put it this way. I believe that on their face seeking nine years of data is

absurd. On the face of the subpoena, seeking nine years of data is absurd, but that aside, what they're actually likely to get is a year of data, dating from the -- the issuance of the subpoenas.

Now, as far as I understand, the operative subpoena was issued in October of 2012. That means that what they're actually likely to get, should the ISPs comply, is data from October 2011 to October 2012.

And that would be a data -- a range of data that's completely irrelevant to the claims in this case. The complaint was filed months before that. So I don't see how that data could be remotely relevant to proving what they're trying to prove.

THE COURT: Now, one aspect, and you have a number of element to your motion, is overbreadth.

MS. HOFFMAN: Uh-huh.

THE COURT: And -- and one response to that from Chevron, as well, that can be -- that can be addressed through (inaudible) means of limiting the request.

So instead of nine years, I could say I'm going -- I'm going to limit it to one year, so we're not even going to look for documents for -- beyond a year, or it's also an observation that not every one of the Does responding to these are identically situated. Some of them are closer to the litigation than others.

And one approach might be to say well, all right. We're going to pick the five that are most closely tied and would be people that did possess relevant information, and we're going to address the overbreadth concerns by targeting this to these five or what -- certain number of people for this period of time and for these topics. And that would address the concerns -- substantially address, not a hundred percent, but substantially address your concerns.

Why wouldn't that with a sufficient protection for the interests and -- and be kind of a fair middle-ground here?

MS. HOFFMAN: Well, Your Honor, I understand how -- how you might think that that might address the overbreadth concern, but -- but there are other concerns too. There are legally required tests that Chevron needs to meet that it hasn't. And those tests meet -- require, among other things, that Chevron not be able to get this information from anywhere else.

And unless it can show definitively as for each -- as to each and every one of these Non-Party's email addresses that it absolutely was not able to get that information anywhere else, it's not entitled to this information under these -- under these First Amendment standards.

And so I think that simply narrowing the subpoena simply wouldn't address all of the issues that we've raised

here.

THE COURT: All right. I think you said there were two cases you wanted me to focus on?

MS. HOFFMAN: Yes.

THE COURT: *Perry* was one of them. What was the second one?

MS. HOFFMAN: The second one is called *Doe versus 2TheMart*, and it was just a couple of months ago cited with approval by the Ninth Circuit in a case called *Mount Hope Church v. Bash Back!*

And this is the test that we use when a litigant -- a private litigant is seeking the identity of a non-party to litigation. So this is not a situation where Chevron is seeking identifying information about defendants. It's seeking identifying information about non-party witnesses, and so the proper test is *2TheMart*.

And Chevron has suggested that the Court perhaps look to other tests, specifically *Arista* in the Second Circuit, and the test articulated by *See's Candy* here in the Northern District of California, but those tests are not appropriate because those are tests that courts have developed in situations where litigants are seeking identifying information about parties to litigation. You know, they're -- they're seeking to figure out who it is that they want to sue, for example, right. They just don't know

what the person's identity.

So this is a totally different situation. Basically, there are two buckets. We're not in the *Arista* bucket or the *See's Candy* bucket. We're in the *2TheMart* bucket because we're talking about non-parties to the litigation.

Now, under *2TheMart*, the Court weighs four factors in determining whether it's appropriate for a litigant to be able to get identifying information about a witness.

Factor one is whether the information is relevant to a core claim or defense.

Factor two is whether identifying information is directly and materially relevant to the core claim or defense.

Number three is whether that information is unavailable from any other source.

And number four is the question of whether the subpoenas are issued in good faith and not for any improper purpose.

And under this test, Chevron -- Chevron loses. And if --

THE COURT: They disagree. They say that they satisfy each of those tests, even if that is the right standard.

MS. HOFFMAN: Well, actually, they -- they -- they

-- they tried to meet the *Arista* test, which, as I explained, is not the right test. They never tried to meet the *2TheMart* test.

THE COURT: I'm going predict that Mr. Boutrous is going to say they satisfied it, but I -- but I'll give him a chance.

MS. HOFFMAN: Well, if you look at the papers, Your Honor, you see that they never did the analysis. And the reason why I think that is is because I don't think that they can meet that test, and so they tried to choose another test and say the court should follow that one, but it's simply the wrong test.

And if you do the *2TheMart* analysis, I -- I think that you'll find that Chevron has not made its burden and the identifying information it seeks should not be turned over.

THE COURT: All right. Thank you very much.

MS. HOFFMAN: Thank you.

THE COURT: Mr. Hicks, anything to add? Does Mr. Hicks have anything he wants to add on that side of the --

MR. HICKS: Would you like me to speak now or (Inaudible - - due to simultaneous colloquy.)

THE COURT: If you'd like, I'd like to have -- get you your side of the --

MR. HICKS: Well, to begin with, you know, I -- I agree with EFF's argument. We -- we join it. I just wanted

to add a few quick remarks.

First is, you know, I think we need to look -- take these -- these subpoenas and put them in perspective. You know, these -- these -- these -- these two subpoenas are not -- they did not -- they were not served in a vacuum. They're part of a large -- a large struggle, to -- to put it mildly.

THE COURT: To stay the least.

MR. HICKS: And Chevron has taken just an extraordinary amount of discovery in -- in this matter. I mean, I think that much is -- is undisputed.

Even before filing the -- the RICO complaint, they spent a year doing discovery. I think they -- they initiated 23 or so 1782 proceedings. Of course, one of those 1782 proceedings was the Donziger matter before Judge Kaplan in the Southern District of New York.

It's well known that Donziger provided incredible amounts of discovery in that case. He -- he -- he provided tens of thousands of documents. He -- he -- he imaged his hard drives. His -- his associate imaged his hard drives, provided them to Chevron, complete with wedding pictures and all.

You know, they -- Donziger testified in deposition for 16 days, you know, including about, you know, email account information.

There were some questions about some -- some seldom

used email accounts. To provide full discovery, he subpoenaed ISPs, including Yahoo! and Google, to obtain information about certain accounts, including certain accounts that are at issue in this case. To the extent that there's any responsive information, Chevron already has it. Okay.

He also authenticated more than 10,000 documents that -- that were -- that were produced on -- on his hard drive so, you know, Chevron just got an incredible treasure-trove of information from that 1782 proceeding.

Chevron has also taken extensive discovery in -- in the RICO case. They have served dozens of third party subpoenas. They -- they served third party subpoenas to -- to -- to four of the account holders here, including Lara Garr, Andrew Woods, Brian Parker and Aaron Page. All of those people testified in depositions, including about email information, so Chevron has that -- that information as well.

As -- as part of party discovery, Chevron in our case has served, you know, hundreds of -- of -- of requests for production. They've served over a thousand requests for admission, including over 600 requests for admission targeted to authentication issues. I understand that those do not overlap with the, you know, 13,000 or so documents that were authenticated in the 1782 proceeding.

Bottom line here is that, despite Chevron's

protests, it has sought and obtained truly unprecedented amounts of discovery in -- in -- in our case and all over the country.

To the extent these subpoenas seek any kind of relevant information, it's very likely that Chevron already has it or will obtain it during the normal course of discovery without having to, you know, subpoena Non-Parties.

On top of that, we now know that Yahoo! and Google only retain this IP address information for a year or so. As -- as Ms. Hoffman was explaining, you know, counting back from the -- the service date in -- in -- in -- in this case, you know, we end up with IP information, you know, in September, October 2011 period, which is, you know, six, seven months after the allegedly fraudulent judgment issued, six, seven months after, you know, Chevron filed suit in the RICO case.

I mean, our -- our position, not surprisingly, is that IP address information postdating the judgment just has absolutely no -- no relevance here, and worth noting also that -- that Chevron in our case has taken the position that at least as a -- as a default matter, it does not intend to provide discovery after the date of the judgment, you know, with -- with extensions here and there, depending on the request, but as -- you know, as a default principle, you know, it's not prepared to provide discovery after -- after

the date of the judgment, you know.

And I think it would be disingenuous for them to claim now, and I don't know that they do, but I think it would be disingenuous if they do so contend that, you know, what's good for the goose is not good for the gander and, you know, they can just go ahead and serve third party subpoenas, and then there's just no limit to -- to the amount of discovery that they can -- that they can obtain.

THE COURT: Well, what if I address that aspect of the overbreadth by saying -- all right, we'll go with the goose and gander metaphor -- I'm only ordering production of materials from before the judgment.

And if no such documents, no such information exists at Google and Yahoo!, all right, then no harm has been done on the privacy front because no information has been produced, but stuff after is irrelevant or -- or borderline relevant if it's outweighed by these other privileged and confidentiality concerns.

The period earlier would arguably be more relevant, but may not even exist, so why not fashion a remedy that sort of goes in that direction?

MR. HICKS: I think that's right, but there's -- there's still the issue of -- of identifying information and that's -- that's a different category of the subpoena. And, you know, I think EFF has rightly spoken about the dangers of

-- of outing people who are engaged in advocacy efforts.

But the bottom line for us is that, you know, we're concerned here that the purpose of these subpoenas is not truly to obtain relevant information that Chevron needs to prove its case.

We're -- we're concerned that these subpoenas are -- are part and parcel of a broader effort of Chevron, basically, to go after anybody who has ever done anything on behalf of -- of -- of the case, has ever associated with Donziger in any way, and that, you know, ultimately the result is that, you know, participation in -- in the advocacy process is chilled.

We just don't think it's a proper use of the subpoena power.

THE COURT: All right. Thank you very much.

Mr. Boutrous.

Ms. Hoffman, I'm going to give you a chance for the last word so --

MS. HOFFMAN: Well, I wanted to correct something that I said earlier, Your Honor, if you don't mind. I -- I -- I said something that was not quite right.

THE COURT: All right. Go ahead and correct.

MS. HOFFMAN: So I said that Chevron did not even attempt to meet the -- the -- the *2TheMart* test, and I was incorrect about that, and I'm sorry.

They did -- they do attempt to meet it in a very cursory fashion. They still fail under it, as far as I'm concerned, for the reasons that I said earlier, but I just wanted to clarify that they did at least try.

THE COURT: Very good. And -- and I'm about to be -- be confirmed that Mr. Boutrous thinks that they've satisfied it.

MR. BOUTROUS: Yes. I will get to that, Your Honor.

THE COURT: And -- and Mr. Boutrous, you can particularly address anything you wish to, but the timing aspect of discovery post-judgment and prejudgment, and the assertion that Google and Yahoo! only have retained a year of information anyways, so sort of your views on that.

Of course, I'm looking at this and -- and know from other aspects of the case this is just one small part of a very, very large global litigation, and I think the most important question here is doesn't Chevron already have enough information to -- to use what it has to support its interests?

And isn't this information -- even if it is relevant in a legal sense, is it repetitive, duplicative, and not necessary, in light of the confidentiality and other concerns expressed by the Moving Parties?

MR. BOUTROUS: I will definitely address those

issues, Your Honor, because we -- we are sensitive to -- to all those issues. I -- I think I'll -- maybe I'll start -- I'd like to put this in context because a major gap in counsel's presentation, both of them, was what are the issues at stake in the RICO case? Why do we need this information?

So I thought I'd start with what are we actually seeking and why do we need it. If I make those -- and I will address the *Perry* case, which I argued so I know something about it, so I'll address those standards, and also the *2TheMart* case.

And I'd like to hand up -- and I've given copies to counsel -- a couple of documents. Well, one is a Yahoo! -- the -- the response to Mr. Donziger's -- so the Court can see the kind of information we're talking about seeking.

And then it's another Supreme Court decision, *Taylor versus Sturgell*, which goes to some of the standing and representation issues.

So let me start, Your Honor, with, you know, why we think these motions should be denied, but to put this in context what's this all about.

First, we are seeking very limited information from Yahoo! and Google. We're not seeking emails. We're not seeking substantive communications. We're not seeking anything, other than the I -- the -- the addresses and the IP -- the IP log-in information and the like and address and

usage information.

So first of all, this is not some big First Amendment battle about intruding on political speech. This is not a big political battle about privacy.

The First Amendment does not create a right to engage in fraud. There's no right to privacy to engage or to assist or to participate in a racketeering enterprise. And there's no right to anonymous speech to participate in a racketeering enterprise.

And our -- our lawsuit in the Southern District of New York, which no one mentioned, is all about what we think is the -- is the -- a massive fraud to extort and get $19 billion from Chevron, so that's the core of the case.

And there are multiple issues to which this information is directly relevant. We wouldn't be bothering you. We wouldn't file subpoenas if we didn't think we needed the information, and I'll -- I'll come back to even more detail why we need it.

The -- the -- the information we're seeking, the IP address, the log-in information, is routinely compelled by courts. It's routinely provided by Yahoo! and Google. They have a system that is all set up to provide the information. They are not objecting to these subpoenas, and so it's -- it's a common routine thing. Mr. Donziger himself obtained some of the information today.

And there's -- there's no First Amendment or privacy interest. The California Court of Appeal in the *Stipo* case on privacy said there's no privacy right to this information. This is something that all these individuals gave to a third party. They gave to Yahoo! and Google their -- their information about their computer and that information.

The user agreements say "We will respond to subpoenas and produce this information if -- if we are asked to produce it in a legal proceeding," so everybody is on notice.

THE COURT: They're on notice, but, of course, they've now objected to it and they're asking the Court to quash it so --

MR. BOUTROUS: Exactly. And -- and -- and also, Your Honor, I want it clear. I respect the notion that we have to have a balance between privacy. I -- you know, I -- we understand that. Chevron understands that. So we understand there's a balance. And -- and the problem is none of the tests that counsel mentioned, none of the First Amendment principles, privacy principles apply to this case, and I'll -- I'll explain why.

First, the notion that these 31 individuals who -- that counsel represents -- Ms. Hoffman represents are labeled "John Does" and "Jane Does." They give all the other John

Does and Jane Does in the world a bad name because we know who they are.

Some of them -- I'll give you an example. Mr. Page -- and I'm not disclosing anything because he signed a John Doe declaration -- ampage@gmail.com is his email address, and he signed this declaration with that as though no one would know who he is. It's clear who he is.

We know who every one of these individuals are. There's no -- they publicly affiliated themselves with the case. They're not anonymous speakers. They're identities are known. Many of them we have documented it in detail, so I won't go through it in the brief, but on their Facebook pages, in their email address themselves, these are anonymous speakers. These are people who are using their names in their email addresses, so that whole line of anonymous speaking doesn't apply to begin with.

The other point, and I think the Court alluded to this, these are not strangers and innocent bystanders, at least according to our lawsuit, which -- which I'll come a back to what the claims are, but these are lawyers.

Mr. Page is a lawyer for the Plaintiffs. He's -- but he's listed here as a John Doe witness or John Doe individual when there's a document in the record -- it's Exhibit 30 to our response to the Does' motion -- where he sent a letter to our expert witnesses on behalf of the RICO

Defendants, Lago Agrio Plaintiffs, threatening them for their testimony. So this isn't some intrusion on to -- to people who have nothing to do with the case.

These are people -- interns, lawyers, people who have been helping with the pressure campaign from Amazon Watch, from what is known as the Amazon Defense Front who have helped -- and we have -- as counsel so helpfully provided, we have a treasure-trove of evidence, and the evidence shows, we believe, that this has been a fraud. That they're using these pressure campaigns.

We have Mr. Donziger on tape saying that this is what they're going to do.

THE COURT: But that cuts both ways. If you have a treasure-trove of documents, information already, the question is why do you need more, given you already have collected a lot?

MR. BOUTROUS: Let -- let me go right to that point, Your Honor, because here is why we need this information.

The Court -- I know the Court is familiar, since I've been here before on this case with you, that -- with the general parameters -- but I'll give you two examples of why we need it.

At the end -- and -- and as part of our discovery, one aspect of it was -- and -- and the Defendants and the

third party, a filmmaker, objected on First Amendment grounds. Said we are harassing anybody who -- the exact arguments he just made.

They've made that argument many times, and -- and we've prevailed virtually every time and obtained the information, and we've obtained a treasure-trove of information, but it's led us to the brink of truly exposing in graphic detail one of the most massive litigation frauds in -- in world history.

And we want to use this information in term -- sort of traditional gumshoe process to -- to dot -- you know, follow the dots, follow the trail, follow the trail from New York where Mr. Donziger is all the way to Ecuador to show -- we already have significant evidence -- but to really button it up that the RICO Defendants ghostwrote this supposedly independent expert's report, Mr. Cabrera.

And I think this Court has dealt with some of the issues on this but --

THE COURT: I have.

MR. BOUTROUS: -- throughout the case early on they touted it to Congress. Mr. Donziger testified to Congress that the best evidence of the -- Chevron's wrongdoings, this assessment by the court-appointed neutral expert, here's his report, $27 billion worth of damages. They said it to courts. They said it publicly. They said it to members of

the Senate, Congress, to try to pressure Chevron into buckling under under this. And they had Amazon Watch and all these other groups helping them do that.

The Crude outtakes, which the Court is familiar with, that was a subpoena. First Amendment objections made. Claims of harassment made. We got the 600 hours of outtakes, and it showed that they ghostwrote that report. It showed them meeting with the supposed neutral expert. We got their other documents that show their participation in that.

But we now want to figure out how they engineered as part of their racketeering scheme, which we're arguing in our RICO case, how they did that. How did they get the information to Mr. Cabrera?

We have some of the email accounts here we know were used as part of that, but the -- we're seeking information -- I don't think Ms. Hoffman represents anyone there -- but we don't know whose identity it is. I'll come back to that standing question if the Court gives me a chance.

But -- so we want to, one, further show which computers with the IP addresses. We can show which computers went on to these email accounts, and we think there's many of these dummy accounts. The Court is probably familiar.

People engaged in crimes and elicit behavior often create these email accounts. They don't send emails to each

other. They all go -- they log into them, drop off documents, come off the email set. Then the other person goes in, looks at the document. It's a way to conceal elicit behavior, and we have those here. We have a couple of them where we -- we know they engaged in exactly that behavior.

So we want to further demonstrate in court before a jury that they ghostwrote this report as part of a fraud to get the judgment in Ecuador and as part of the ongoing fraud that's going on right now that they tried to enforce the judgment with respect to the report.

But probably more importantly, Your Honor, for our purposes -- and this is something I don't think has really been put before this Court yet. We have evidence that they not only ghostwrote that report, but that they ghostwrote the judgment, the 19 dollar -- 19 million -- $19 billion judgment.

And several courts, including Judge Kaplan, have said we've raised serious questions. That's going to be an issue. They -- we think that they wrote the very judgment they're now going around to Canada and Brazil and Argentina. They won't come to the United States.

They won't come to this court, which is very close to Chevron's headquarters where there's a lot of money they can try to attach. They won't come here because we have evidence that U.S. District Courts have said strongly suggest

that they wrote the very judgment they're trying to enforce.

We have evidence of that through a couple of reasons.

One, we have evidence that documents internal files from Mr. Donziger, from the -- from the Plaintiff's team somehow made it into the judgment. They were never filed in court. We -- but -- but they're in the judgment.

We also have expert forensic evidences that documents how it appears this judgment was ghostwritten by the Plaintiff's lawyers.

So now we want to find how the information was transmitted, and we believe it was through internet accounts and email accounts.

So this is classic investigative techniques, and so these accounts -- that's what we're really -- the -- the -- the most important thing we want to do -- we think we may be able to trace it from someone in the United States, or their computer, all the way to Ecuador into the courtroom or someone working with the judge to ghostwrite this judgment.

THE COURT: That's all -- I want you to get to the timing issue.

MR. BOUTROUS: Yeah.

THE COURT: All that narrative you're just sharing sounds like irrelevant things that occur that were prejudgment, the drafting of the judgment, communicating this

information.

Why is discovery post-judgment relevant for this (Inaudible - - due to simultaneous colloquy.)

MR. BOUTROUS: Well, we think, one, cover-up activities. We -- we have -- you know, we cite an email, I think, in a -- it's in the response to the Doe motion where when the lawyers in Ecuador realize we were hot on the trail of exposing the Cabrera fraud, he wrote an email to -- I believe to Mr. Donziger, but to others, but we have the email it's in the record here, where he says "If this is exposed, we're going to go to jail."

And from that point on -- and that was, you know, a little bit before the judgment -- but from that point on we have internal documents that show the -- the -- the RICO Defendants were doing whatever they could to cover things up to -- to hold back information.

That's one of the reasons we need this information. We can't get this information any other way. We cannot pinpoint which computers were used, how the information was ultimately funneled, which we believe happened, to the judgment -- into the judgment without this technological proof.

And -- and with respect to the -- the current situation, we -- part of our argument in New York is this an ongoing fraud. If someone tries to enforce a judgment they

know is a product of fraud, that they know they wrote, and that they know has evidence that they illicitly put into the court secretly under false pretensions, that's a fraud. That's part of the racketeering enterprise.

So evidence coming up to the present, we believe, is -- is -- is a relevant. It's not a goose for the gander issue. And that's one of the issues I think Judge Kaplan has been grappling with, and we -- we just want the evidence to be -- get put on the record so -- so we can -- we can get a trial on these issues.

The -- the other part of this that I wanted to emphasize, Your Honor, is that the -- the -- the RICO Defendants argue that aren't enough contacts. That this is an extraterritorial application of RICO.

We say that's ridiculous because Mr. Donziger was in New York much of the time. Many things happened in the United States. But evidence that we can show that there were communications made between computers that were used here in the United States, emails that were sent, individuals in the United States logging on to these -- these email accounts, which we believe were drop boxes for potentially documents that were improperly going to the court, linking that to the United States.

The IP address and the log-on information will help -- will allow us to figure out where the person was, what

country at least, when they went on to that email site.

So if we -- we can use that to show people in the United States were directly communicating information into the court into the judgment as part of the fraud.

THE COURT: I'd like you to address the overbreadth argument in this way. The part of Ms. Hoffman's argument was Plaintiffs are seeking nine years of information from many, many individuals. You already have a lot of information, so this is overkill.

And one response to that might be to limit the information I'll say all right, we'll all do a compromise here. I'll give you some percentage of what you're asking for, but ask you to prioritize and say well, here's the -- you know, this is the part that you most need, have the highest need for with at least to damage.

If I were to encourage that approach, what would be the part of this request that you would find most valuable to your client to accomplish, if I were to say I'm going to give you some but not all?

MR. BOUTROUS: Couple thing, Your Honor.

One, there are several accounts we would identify -- well, first, they're not represented by Ms. Hoffman so they're -- they only represent 31 of the accounts, so the other accounts we would say there's no restrictions. There's no standing. They don't represent the people. And some of

those accounts are accounts we believe clearly were these dummy accounts, so that would be helpful to us.

So if we took those -- there's 31 people they represent. Take the rest of them off the table. That's -- that's significantly helpful. And I can come back to the standing issue if the Court would like me to.

Second, there are -- we went back nine years because that's when the -- the action was filed. That's when the fraud began. We recognize and it sounds -- we're not just necessarily disputing -- in fact, it looks they have information from Google or Yahoo! or both that this information isn't kept for significant amounts of time. We'll take what we can get, you know, and -- and -- so we would take whatever they have, if it only goes back a year.

But I think there may be information that goes back farther, for example, when someone opens up the account. The original information would at least give the country, give the -- the -- the -- the place -- the -- the -- the -- the identifying information we need, so those sorts of thing would -- would be very helpful.

I also think, Your Honor, this -- this issue -- the notion -- I think it's -- it's compelling as an advocacy tool to say we're trying to out people who are engaged in political speech. You know, I don't like the sound of that, if that's what we were trying to do.

But as I said, these are not anonymous speakers. These are not people engaged in a political campaign like in *Perry*. These are people who we allege were in some way, some of them at least, many of them, part of the scheme, or at least in some fashion wittingly or unwittingly participating in the scheme.

And the fact that they were engaged in communications online doesn't make discovery any less appropriate. If this Court -- if I came in and said, "Your Honor" -- nobody likes to have discovery served on them and a third party doesn't like that, but it's always to a certain degree an intrusion on your communications with other people, and that's what we have here.

It's not enough to say, "I communicated on these issues. Now you're trying to get my communications, or at least some information." We're not even try to get the content, but that's what happens every day in every discovery request.

THE COURT: Well, you're right. I mean, this -- the Federal Rules direct that the Court should give extra scrutiny to a third party request, and it's exactly for that reason.

This case has an additional overlay, which is this is one part of an international litigation with multi-fronts and multi-parties and -- and allegations going in various

directions of fraud.

And -- and a lot of discovery has already occurred, and the question is, in that context, should I be permitting more discovery, and if so what protection should be afforded?

MR. BOUTROUS: And I understand, Your Honor. Let me -- maybe that's a good place for me to turn to the -- to the *Perry* case and the tests and the specific arguments, if the Court will let me go --

THE COURT: Go ahead.

MR. BOUTROUS: -- go -- ramble on a little bit longer?

THE COURT: Please.

MR. BOUTROUS: You know, first, let me start with the *Perry* case because, as I mentioned, I argued that in the Ninth Circuit. I dealt with the issues on remand with Chief Judge Walker and Magistrate Judge Spero.

The *Perry* discussion is extraordinarily narrow on this issue. I mean, it -- we -- we -- I think we obtain something like a hundred thousand pages of documents and -- and this was not this loose group of people we believe were at least pulled into a racketeering enterprise. This was the protectmarriage.com, the political entity that -- that ran the campaign for Proposition 8, and I was representing the Plaintiffs.

So we -- so we subpoenaed their documents for a

variety of reasons, but to show in part that there were improper biases that led to Proposition 8.

Footnote 12 of the decision, you know, in -- it's on page 1144 of the *Perry* case -- really puts it all together. The Court said, "We're only" -- and this is their own italics. They said, "We emphasize that our holding is limited to private internal campaign communications concerning the formulation of campaign strategy and messages."

The Court went on to say that it was "Focusing on a small core group of the leadership."

We had a lot of litigation about who that ultimately was during the trial, but who the leadership of the campaign, so it was a core group of people in an identified political entity, a campaign, and that's where the Court applied this burden shifting test.

So it didn't apply to people who happened to be communicating with protectmarriage.com, who would have, I think, a stronger argument than these so-called Doe Defendants -- Doe Movants.

The Court also said, "Our holding is, therefore, limited to communications among the core group of persons engaged in the formulation of campaign strategy and messages."

And -- and then remanded to Chief Judge Walker and

Judge Spero to figure out who that was and how it played out.

That's the test. The Court went on (inaudible) and then it attached a document -- one of the documents that I had given the Court at the argument of one of the proponents of Proposition 8, one of the people who put the ballot on the -- the initiative on the ballot, and he was communicating, engaged in core political speech. And we obtained this document, and the Court said, "This kind of document must be produced." So we're talking about an extraordinary situation.

In the other cases, for example, the -- the *Dole* case that the -- the other side cites involved union political activities of a group.

The other cases involve lists of membership. That -- that it could chill someone if they joined a political group to compel disclosure of the political groups.

That's not what we have here. This is litigation, number one. Litigation is supposed to be transparent and public and open. It's not supposed to be anonymous. We don't allow anonymous litigation.

We shouldn't really allow lawyers in a case to file something in court as a John Doe when they represent some of the people who are involved in the case, which is what happened here, but it's different than political advocacy, number one.

Now, litigation is a form of speech and a form of petitioning government, but it's done according to another set of rules. You -- you -- there are rules of accuracy in what you say. There's openness. And, you know, the -- the bottom line is it's different than the kind of political campaign, pure political speech, very limited in terms of what was -- was said to not be discoverable in the *Perry* case. That test just does not apply here.

If it did -- and if we did apply it, there -- these people are not members of an organization. They're not the core group members of an organization. They're not formulating internal messages.

We're not seeking any content from them. We're not seeking internal, external messaging or any content from them. So we win under *Perry*, go and away. There's just no question about it. It doesn't apply to this situation.

THE COURT: Well, talk about politics though. I mean, this is a case that involves a sovereign nation. It's got -- more than one. It's got -- there's litigation in multiple countries going on. There's some international arbitration going on. I know not involving Mr. Donziger necessarily, but the overall (Inaudible - - due to simultaneous colloquy.)

MR. BOUTROUS: Yes.

THE COURT: And it's got the Court's attention in

Washington D.C., as -- as both parties have referred to testimony that's been taken there.

I mean, this is not a run-of-the-mill contract dispute where there's a subpoena going to a third party.

It's -- I'm -- I'm not sure I agree with your assessment this is a -- sorry -- that *Perry versus Schwarzenegger* was a political case involving elections and this is something that's agnostic and commercial.

Isn't this also a very political case where there should be heightened concerns about the First Amendment activities?

MR. BOUTROUS: Well, here though, Your Honor, I think the big distinction -- again, I think there is a distinction because that was a -- you know, a campaign, so it's probably the zenith of political discourse, and you had the entity that was running the campaign, so that's -- on the spectrum, it's way up here.

Here, yes, part of the strategy that Mr. Donziger and his team used was to make this is a political issue to try to pressure Chevron through lobbying the Senate, the SEC, we believe, making repeated false statements that are criminal, but that was part of the strategy, but -- but yes, so there are other implications.

But then look at the group of people that we're talking about, if you take the *Perry* case. Let's assume they

get in the door. That there's -- there's a political element to this. Then they would have to be core persons at the helm of the organization or running the political operation.

Then they would have to -- the -- the only thing that would be off limits would be messaging strategy internal documents, not things that were communicated to the outside world, and we're not seeking any content. We're not seeking their emails.

We're not seeking -- I think that's been a bit of -- they -- the -- the suggestion that we really want to get what they're saying. We don't. We just want those numbers that are on that Yahoo! example I gave you that show when someone logged on to a website and which computer matching the ISP address, so we can -- we can further put together what we think is really a nefarious scheme to corrupt justice in Ecuador against -- against Chevron.

And so it's -- it's -- it's not that there's not any speech involved here. It's not that there's not some political overtones. It's that the Court's balanced things, and it's really -- it's a very limited window of material that's taken off limits.

And -- and in -- in the -- the *Perry* case, too, there was this issue of people who had participated and might not want their identities exposed. And as I -- and as I said here, we -- we don't -- the Court didn't even say that that

was off limits in -- in *Perry*. The Court didn't say somehow keep things secret for people who -- we had a big battle over that.

And so it -- it -- even in that context where we had a political campaign, the Ninth Circuit did not say that that kind of information could be shielded.

And here, as I mentioned, the 31 people who have moved as John Does, we know their identity, and we know it from their own activity.

THE COURT: Do you know all 31?

MR. BOUTROUS: We -- I think we -- we know all 31.

THE COURT: You wanted to address the standing issue, and let me --

MR. BOUTROUS: Yes.

THE COURT: -- give you that -- that chance.

MR. BOUTROUS: Thank you very much, Your Honor. On the standing issue, first, the -- and I'll address maybe the -- the Defendants first.

The Defendants only have standing with respect to the subpoenas to themselves. The subpoenas are to Yahoo! and Google. To the extent they have interests that are implicated, they can come in and -- and assert them.

The only real interest they've seemed to assert really is -- is a -- sort of a privilege or something about, you know, the fact that there's a privilege as to where they

might have been work. There's no case that supports that, and -- and -- and there's no privilege as to facts about where an attorney might have been at some point.

But as to standing to assert the rights of everyone else, they have no standing whatsoever. They don't represent those people. There's no such thing as third party standing to block a subpoena to someone else. The cases are very clear on that.

With respect to the other -- the Does, they go even farther. They list out a test about representational standing, and that's why I wanted to bring the Court the *Taylor versus Sturgell* case.

Article III of the Constitution does not allow someone from an advocacy group who doesn't represent or know third parties out in the world to come into federal Court and say "I'm -- I'll go a good job. I'll act zealously. The issues are the same," with -- without representing those people.

The *Taylor* case was this virtual representation case, and the Court unanimously in an opinion by Justice Ginsburg said, "There are very limited situations where we will say a lawyer or another party represents someone not before the Court, class actions."

This isn't a class action, so they have absolutely no standing. There's no case for controversy regarding other

people. They speculate about why people might not have objected. That's not even close to meeting Article III standing or giving them a right to make arguments regarding people who aren't before the Court.

And maybe I'll finish with the two -- the *2TheMart.com* case because in that case -- first, the Ninth Circuit has not adopted that standard, but we meet it. The Ninth Circuit mentioned the standard and mentioned a variety of other standards. We've laid them out, but for all the reasons we -- I just laid out, we meet the standard.

First, the subpoena was issued in good faith. As I've laid out, we have a very proper important purpose and a significant case. It goes right to the cores of our claims that are being adjudicated in the Southern District of New York.

And Judge Kaplan rejected the motion to dismiss those claims, and found at the summary judgment stage many our claims about fraud are uncontradicted. That -- that we have foreshown uncontradicted evidence that fraud tainted the Ecuadoran proceeding, so it's a good faith request for information. That's standard one on *2TheMart*.

Two, this information relates to our RICO claims for the reasons I mentioned, to -- to connect the dots between the -- the ghostwriting of the judgment, the ghostwriting of the expert report, to show the connections to

the United States, and also just to -- to understand how the racketeering enterprise is managed, structured and operated to commit what we believe is a fraud.

And -- and, as I mentioned, third, the information we seek, which is narrow, relates directly to that. That's what it would allow us to do. That's all we want it for. So it -- that meets the third test.

And then, finally, we cannot obtain this information from anyone else. Nobody will provide us all their IS -- IS information and their -- the -- the things that are on that Google printout or Yahoo! printout you can only get from the service provider.

We have -- we have taken a lot of discovery and we've been trying to -- to -- to close the loop here and -- and -- and connect all the dots between what's been happening. This is the only place we can get it, so we -- we narrowly target it to take substance off the table, but we meet that *2TheMart.com* test.

That case, Your Honor, that was a classic example where the identity -- that was an identity case. It was a derivative action where the -- the Defendant -- a shareholder derivative action. The Defendant said that anonymous posters who had posted things about the company caused the stock to drop.

And the Court said "Well, their identities don't

matter. It's what they said."

Therefore, the connection between the identity and the -- the -- the issue at stake was too tenuous, and so the Court said there was no basis for -- for revealing their identities.

That's much different situation than we have here where we know everybody's identity, and the issues go right to the core of our claim in New York.

THE COURT: All right. Thank you very much.

MR. BOUTROUS: Thank you, Your Honor.

THE COURT: Ms. Hoffman, I'll give you the last word.

And if you could -- one thing I did not question about was the standing question --

MS. HOFFMAN: Yes.

THE COURT: -- and your -- your thoughts on that (Inaudible - - due to simultaneous colloquy.)

MS. HOFFMAN: Would you like me to take that first?

THE COURT: If you would, please.

MS. HOFFMAN: Sure. So Your Honor, as you see in our reply, because standing was raised for the first time in opposition, there is a precedent out there that -- that shows that -- excuse me -- please let me get my notes in order. All right.

There's a doctrine called the Third Party Standing

Doctrine, and it is something that tends to be applied especially in First Amendment cases because the -- the interests there are -- are so important and grave.

And basically, what the Third Party Standing Doctrine says is that when there are practical obstacles that prevent others from asserting their own rights, then it's okay for a third party to assert their rights for them.

And the -- the big questions that the courts look to there is whether the third party suffered -- the third party that wants to -- to assert the rights of others suffered an injury, in fact, and whether that third party can be expected to properly frame the issues and present them with the necessary adversarial zeal.

And we -- we cited the cases, the *Enterline* case and the *McVickers* case and the *Indiana Newspapers* case, in which courts have applied the Third Party Standing Doctrine in situations actually quite similar to this, in which litigants have tried to seek the identities of online posters.

And in those cases, there were newspapers that had websites, and the posters had -- had written comments on the newspapers' site, and the newspapers went ahead and asserted the rights of their posters. And the courts allowed that, citing the Third Party Standing Doctrine.

So I think this is definitely a case where we have

individuals who are facing practical obstacles preventing them from asserting their own rights.

As an -- as an initial matter, and -- and I think this is hugely important, we don't know that all of these individuals received notice of these subpoenas.

To their credit, Google and Yahoo! sent emails informing them, but we don't know whether they read those emails, whether they were filtered into their spam folders, whether they could even read them because some of them are -- are not people who are U.S. citizens.

You know, we -- we don't know that they actually ever received notice of this. I mean, sending an email to somebody is not legal process, right. So I -- I -- I think that that is certainly a practical obstacle.

And not all those people are necessarily in a position to easily appear in this court and contest the subpoenas either.

Third party injury. In fact, all of the people, all of the Non-Party Movants who are bringing this motion are -- are -- they're similarly situated. They all have these associational interests that are all kind of tied up in each other, and they have these -- these anonymity arguments as well, and so each Movant is in a position to assert the rights of the others. And so it's -- it's not as though there's -- there -- there's any Movant who's in a -- in a

substantially different legal position.

And then, finally, we can frame the issues fairly and present the -- the arguments with the necessary adversarial zeal because here we are in court. They're -- they've all joined together. They've secured counsel, and -- and we're -- we're here framing the issues that's common to all of them and presenting them, and so I think third party standing is absolutely appropriate here.

And turning to the *Taylor* case for a moment -- we were just handed this right before the hearing, so I haven't had time to go through in tremendous detail, but it is not a First Amendment case and it's not a third party standing case either.

It's a FOIA case, Freedom of Information Act case, that involves preclusion, the Preclusion Doctrine. And you know, the question in that case seems to be if somebody brings a FOIA lawsuit and loses it, can a second person bring a FOIA lawsuit, or is that person precluded from doing so? And that's just not what we're dealing with here. It's just irrelevant to this case.

If you find this compelling precedent, and you'd like to hear more about how it may or may not apply, I would appreciate a chance to brief that though because, as I said, I just got a chance to look at this right before the hearing.

THE COURT: All right. I'll take that request

under consideration.

MS. HOFFMAN: Have I answered your questions about third party standing?

THE COURT: Yes.

MS. HOFFMAN: Okay. So I can get --

THE COURT: Well --

MS. HOFFMAN: -- into rebuttal now?

THE COURT: You may. Well, one question I have is the -- -- Chevron makes the point that well, they're not seeking anything more than just the IP information, the -- not looking for the substance of the emails. What's such a big deal? It's not a privacy concern because they're not actually looking for substance.

What do you think about that?

MS. HOFFMAN: So here's what they're seeking, as far as I understand it. They're seeking identity information, and they're seeking IP logs that would reflect when people have logged into their -- into their accounts.

And in the aggregate, over a long period of time, what information shows is people's movements and when they're in the same place at the same time.

As Mr. Boutrous mentioned, they were curious whether people were in New York at the certain time or in Ecuador at a certain time, and it -- you know, this is information that might reflect when they are at work, when

they are at home, when they are at a certain office, when they share an IP address and so they're likely to be in the same physical location at the same time.

And considering that these are people who are all engaged in -- in political activism -- I know Mr. Boutrous calls it a pressure campaign, but I would say it's public criticism against Chevron -- and this is information that they're asking the Court to -- to -- to force Google and Yahoo! to release to people who obviously don't like what they're doing. I think that raises some very profound associational concerns.

And I -- I know that Mr. Boutrous says that the *Perry* case is extremely narrow and somehow it only applies to situations where the -- where somebody is trying to compel the disclosure of internal communications, but the Supreme Court has precedent that is very different than that.

NAACP versus Alabama said that the disclosure of rank and file members of an organization raises concerns -- associational concerns, AND -- and found that that would violate First Amendment right of association.

And also, his suggestion that litigation is somehow not protected by First Amendment right to association is -- is wrong as well.

NAACP versus Button, another Supreme Court case, says litigation is -- is -- is -- is protected associational

-- is a protected associational interest.

And that aside, many of these people were not lawyers. They had nothing to do with the case. They are journalists and they're activists and -- and they serve other roles in this whole situation. And basically, their involvement is just speaking out publicly and saying they don't like what Chevron did.

And, you know, I think that to suggest that somehow that's not political speech or it's not something that is, you know, worthy of protecting is -- is, frankly, just disingenuous.

And, you know, his suggestion that an organization can't represent the interest of others, I think, also -- you know, *NAACP versus Alabama*, that's exactly what happened. The NAACP stood up for the interest of its members. So I think that, you know, there's plenty of support under the law for that.

And also, I'd like to point out, just turning for a moment to the associational -- or rather, the anonymity argument. We just heard they know who all these people are. You know, I think you really can't have it both ways. Either you know who they are or you don't. And if you know who they are, then this is completely duplicative in terms of the identity information.

THE COURT: All right. I think that I know enough

information. I thank everyone for their presentations. I am going to take this all under submission.

I'm going to be monitoring what Judge Kaplan does, and depending on the timing of that and what more I read about it, I may wait for some interim amount of time.

If I determine that I'd like more briefing on the *Taylor versus Sturgell* case, I'll do (inaudible). I don't think I need more about that.

Any other information I need for today?

MR. BOUTROUS: Your Honor, just on -- can I -- the third party standing issue, which I -- since counsel brought it up.

Those cases involve a situation where the parties subpoenaed had its own interests, so that -- that -- like a newspaper and where an on -- you know, an online commentator's was -- information about that person was being requested.

Then the person who had standing themselves, so they're the newspaper, was able to also argue that First Amendment rights were at stake, but none of those cases involved a situation where one person or one lawyer was trying to represent someone they didn't know and -- and that person hadn't been -- wasn't the subpoenaed person.

So I just wanted to -- make sure the Court knew that because that was in their -- their reply brief too.

Thank you, Your Honor.

THE COURT: All right.

MR. BOUTROUS: Thank you for hearing us.

THE COURT: Thank you all.

MS. HOFFMAN: Thank you.

(Proceedings adjourned at 2:38 p.m.)

CERTIFICATE OF TRANSCRIBER

I certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages of the official electronic sound recording provided to me by the U. S. District Court, Northern District of California, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken; and, further, that I am not financially nor otherwise interested in the outcome of the action.

Stacy Wagner 1/30/2013

Signature of Transcriber Date